

a

PP

v.

SIM SHEN KIM

b

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CRIMINAL APPEAL NO: 20-41-8 OF 1997]
21 JANUARY 1998

c

CRIMINAL LAW: *Common Gaming Houses Act 1953 - Section 4A(a) - Assisting in carrying on public lottery - Ingredients - Whether proved - Accused acquitted and discharged without calling for defence - Whether magistrate erred in fact and in law*

d

The respondent was charged with but acquitted of an offence under s. 4A(a) of the Common Gaming Houses Act 1953 ('the Act'), for assisting in carrying on illegal 4-Digit lottery. The facts showed that the learned Magistrate, in so acquitting the respondent, ruled (i) that there was no credit in the evidence of PW2 and PW4 that the respondent at the material time was writing something relating to illegal 4-Digit lottery, bearing in mind PW1's evidence (ii) that both PW2 and PW4 were trying to create a story (iii) that PW4 in particular was not at all in the picture as regard the arrest of the respondent, or the seizure of the exhibits including the record of stakes ('P1 and P2') (iv) that there was a contradiction of evidence relating to the preparation of the search list which was fatal to the prosecution case. Dissatisfied, the Public Prosecutor appealed. The primary question that arose was whether the learned Magistrate's order of acquittal herein could be sustained bearing in mind the evidence and the facts.

*e**f***Held:***g*

[1] It was wrong of the learned magistrate to make a finding that there were two sets of evidence adduced by the prosecution.

h

[1a] The fact that PW1 did not testify that he had seen the respondent writing can be due to the fact that he did not see the respondent writing. It could be due to the fact that PW1 might have seen the actions of the respondent in different ways and at different times as that of PW2 and PW4. Thus, the evidence of PW1 did not create a discrepancy and there was no two sets of evidence adduced by the prosecution.

i

- [2] There was nothing inherently incredible about the testimonies of PW2 and PW4 that they saw the respondent writing something. The evidence showed that PW4 had testified that the respondent was writing with a ball point, and the ball point was exhibit P5 that was seized. a
- [3] No reasons were given by the learned magistrate for concluding that PW2 and PW4 were just trying to create a story. From the totality of the evidence, the learned magistrate had grossly erred in law and in fact in not accepting the evidence of PW2 and PW4. Clearly, there was no material discrepancies in the testimonies of PW1, PW2 and PW4 to the effect that P1 and P2 were recovered from the left hand of the respondent. P1 and P2, in other words, were found in the possession of the respondent. b
- [4] It is also clear that the learned magistrate erred in law and in fact in not taking into consideration the evidence of PW1 and PW2 that PW4 was with them during the raid. The learned magistrate did not give any reason at all why he rejected the evidence of PW1 and PW2 on this point. On the evidence, it was wrong of the learned magistrate to make a finding that PW4 was not in the picture at all as regard the arrest and seizure. c
- [5] The learned magistrate had erred in law and in fact in not making the correct findings of fact. There was ample evidence that P1 to P5 were found in the possession of the respondent. Clearly, at the end of the close of the case for the prosecution, the prosecution has made out its case beyond reasonable doubt, and the learned magistrate should have called the respondent to enter his defence. d
- e
- f

[Appeal allowed; retrial before another magistrate.]

Case(s) referred to:

Chan Peon Leon v. PP [1956] 22 MLJ 237 (*refd*)

Chean Siong Guat v. PP [1969] 2 MLJ 63 (*foll*)

Khoo Chye Hin v. PP [1961] 27 MLJ 105 (*refd*)

Lim Kheak Teong v. PP [1985] 1 MLJ 38 (*refd*)

Ooi Teck Chin v. PP [1971] 1 MLJ 51 (*refd*)

PP v. Hu Ming Chin [1993] 3 AMR Supp Rep 1146 (*foll*)

PP v. Lee Eng Kooi [1993] 2 CLJ 534 (*dist*)

PP v. Lim Mung Shaing [1989] 2 CLJ 475 (*foll*)

Shafruddin Selangka v. PP [1993] 3 MLJ 750 (*refd*)

Legislation referred to:

Common Gaming Houses Act 1953, ss. 4A(a), 11(1)(c)

Criminal Procedure Code, ss. 64, 65, 307(vi)

- a* For the appellant - Suhaimi Ibrahim DPP
For the respondent - Orlando Chua; M/s Wong, Orlando Chua & Co
Reported by Rusnah Abd Aziz

JUDGMENT

- b* **Tee Ah Sing J:**

This is an appeal by the public prosecutor against the decision of the learned magistrate made on 7 December 1996 whereby the respondent who was charged under s. 4A(a) of the Common Gaming Houses Act 1953 ("the Act") was
c acquitted and discharged.

The charge was as follows:

- d* That you, on 22nd day of May, 1993, at about 10.10 a.m. at Sekolah Memandu Pertama, Market Road, Sibu, in the State of Sarawak, did assist in carrying on a public lottery, to wit, illegal 4-Digit lottery and that you thereby committed an offence punishable under section 4A(a) Common Gaming Houses Act 1953 (Act 289).

The learned deputy public prosecutor ("the DPP") advanced five grounds in the appeal namely:

- e* 3.1. The learned trial Magistrate had erred in law and fact when he rejected the evidence of police witnesses PW2 and PW4 who saw the respondent was writing something near the table without having regard to the credible evidence adduced.
- f* 3.2. The learned trial Magistrate further misdirected himself in law and fact when he ruled the prosecution witness i.e. PW2 and PW4 were trying to create a story that the respondent was writing something relating to an illegal 4D, where there is no credible evidence to suggest the same. And he further misdirected himself in law and fact when he ruled there is a contradiction in prosecution evidence.
- g* 3.3. The learned trial Magistrate had also erred in law and fact when he ruled there is a contradiction of evidence relating to the preparation of a search list and further ruled that PW4 was not in the picture at all as regard to the arrest and seizure without considering the evidence of PW1 and PW2 properly.
- h* 3.4. The learned trial Magistrate erred in law when he gave too much weight on evidence of the preparation of a search list without considering the position and its application under the law which cannot be treated as a piece of substantive evidence.
- i* 3.5. The order of acquittal and discharge is very unsatisfactory having regard with the evidence adduced in the trial.

In respect of grounds 3.1 and 3.2 the learned DPP submitted that there is no contrary evidence to say that the respondent was not writing. Further a ball point was found in the possession of the respondent. Furthermore, there were no two sets of evidence but only one set. So the case of *Public Prosecutor v. Lee Eng Kooi* [1993] 2 CLJ 534 is not applicable. It was submitted that the learned magistrate should have accepted the evidence of PW2 which was corroborated in total by PW4. Thus, the learned magistrate had erred in fact and in law in rejecting the evidence of PW2 and PW4.

a**b**

In respect of grounds 3.3 and 3.4 the learned DPP submitted that it was wrong for the learned magistrate to come to the conclusion that PW4 was never at the said club just by referring to the search list (P6) because PW1 and PW2 gave evidence that PW4 was at the club and in fact he was the officer-in-charge of the raid.

c

It was also submitted that the learned magistrate had contradicted himself in saying that PW1 could not sign the search list as it would contravene s. 64 of the Criminal Procedure Code (“the CPC”). So it would mean that the learned magistrate had accepted that PW4 was at the raid and therefore the learned magistrate had made two contradictory findings as to the presence of PW4. The learned DPP further submitted that the learned magistrate placed too much weight on the search list which is not a piece of substantive evidence. In support the case of *Public Prosecutor v. Lim Mung Shaing* [1989] 2 CLJ 475 was cited.

d**e**

In respect of ground 3.5, it was submitted even if the learned magistrate has concluded that the respondent was not writing the issue is whether the respondent was found in possession of P1 and P2 which are the record of stakes which has been confirmed by the expert (PW3).

f

PW1 has given evidence that P1 and P2 were found in the left hand of the respondent. It was submitted that the respondent was in possession of P1 and P2. In support the case of *Chan Peon Leon v. Public Prosecutor* [1956] 22 MLJ 237 was cited. The learned DPP contended that the presumption under s. 11(1)(c) of the Act arises.

g

The learned counsel for the respondent submitted that in ground 3.5 there were no words like “possession” or “presumption” in the petition of appeal. He further submitted that ground 3.5 does not comply with s. 307(vi) of the CPC and the submission of the learned DPP under this ground should be expunged. In support the following cases were cited:

h**i**

- a* (1) *Public Prosecutor v. Hu Ming Chin* [1993] 3 AMR Supp. Rep. 1146.
(2) *Ooi Teck Chin v. Public Prosecutor* [1971] 1 MLJ 51.
(3) *Shafruddin bin Selengka v. Public Prosecutor* [1993] 3 MLJ 750
- b* He also submitted that PW1 did not even breathe a word as to the fact that the respondent was writing. He further submitted that there is serious contradiction in the evidence led by the prosecution. He also submitted that if the respondent was in fact writing the ball point would have been found and seized either from his hand or on the table. However, the ball point was found in the left shirt pocket of the respondent as confirmed by the search list.
- c* The learned counsel for the respondent submitted that since two witnesses said the respondent was writing while PW1 said that the respondent was sitting near a table and the ball point was found in the respondent's left shirt pocket the scenario has created two sets of evidence. It was thus submitted that the learned
- d* magistrate was correct in applying the case of *Public Prosecutor v. Lee Eng Kooi* [1993] 2 CLJ 534.
- The learned magistrate had the benefit of observing and listening to the witnesses and unless the learned magistrate had grossly erred he urged the court to be slow to disturb the finding of fact by the learned magistrate. In support
- e* the case of *Lim Kheak Teong v. Public Prosecutor* [1985] 1 MLJ 38 was cited.
- In respect of grounds 3.3 and 3.4, it was submitted that there are many instances at the lower court to support the finding of the learned magistrate.
- f* He submitted that the search list was not prepared by PW4. He submitted that if PW4 were to produce the investigation diary his movement would have been exposed. In other words, he will be shown to have been absent during the search.
- In p. 31 of the appeal record, PW5, the investigating officer agreed that on
- g* 22 May 1993 the respondent complained to him that Chief Inspector Rashid was not at the scene. So there was contemporaneous complaint made by the respondent to the investigating officer of this case. He submitted that the search list is a piece of substantive evidence. In support the case of *Public Prosecutor v. Lim Mung Shaing* [1989] 2 CLJ 475 was cited.
- h* The learned DPP in reply contended that ground 3.5 has complied with s. 307(vi) of the CPC. He further submitted that the issue of possession and presumption can come within the ambit of this ground since there are evidence adduced at the trial. Further in the written grounds of the learned magistrate
- i* the issue of possession and presumption was never touched and therefore they were proven.

At p. 10 of the appeal record PW1 testified that “When we arrived there C/Insp. Rashid instructed us to arrest one person who was sitting near the table. After that I arrested the said person. He was holding a booklet believed to be illegal 4D lottery. I conducted a search on him. I found one small booklet serial number 1401-1450, 2 pieces written with figures, 3 pieces of playing cards, cash RM194 and one back ball pen. The booklet and papers found on left hand while cash and pen found in the shirt’s pocket. The playing cards were found in the booklet.”

*a**b*

In p. 12 of the appeal record PW1 said: “In Police Station, Chief Inspector Rashid then made search list because during the arrest, we did not bring the search list.”

c

In cross-examination at p. 13 of the appeal record, PW1 agreed that the search list was prepared/ completed by Chief Inspector Rashid.

PW2 at page 15 of the appeal record stated:

d

On 22/5/93 @ 10.10 a.m. I joined a police party led by Chief Inspector Rashid made a search at Club Mahjung. The name of club is Club Memandu Pertama, Market Road, SibU. On arriving at Club Pertama Market Road, we saw few people playing mahjung and there was one Chineseman sitting alone writing something near the table. Chief Inspector Rashid instructed L/C Parumal to search the said person. I was beside L/C Parumal and I witnessed him searched the said person. L/C Parumal seized one small booklet with serial number, 2 pieces containing figures, 3 pieces of playing cards attached together and from shirt’s pocket he also seized cash RM194.00 and one black ball point.

e

In cross-examination PW2 at p. 17 said he was behind Parumal. He saw the respondent writing something but he did not know what he was writing about.

f

PW4 at p. 24 of the appeal record said:

On 22/5/93 @ 10.10 a.m. I together with police party consisting Det. Parumal, Det. Ponnusamy, Azman and Zulkifli we were in crime prevention duty at SibU area. On arrival at Sekolah Memandu Pertama Market Road, SibU, I saw one man was writing something. Then I instructed Det. Parumal to make search on the said person.

g

PW4 saw Det. Parumal made search where booklet written with number together with 2 pieces of paper and 3 pieces playing card were seized from the left of the accused. The cash and one ball point were seized from the respondent’s shirt pocket. (At pp. 24 and 25 of the appeal record).

h

In cross-examination PW4 at p. 25 of the appeal record said that the handwriting on the search list is Det. Parumal’s handwriting.

i

- a* At p. 26 of the appeal record PW4 said that he only saw the respondent was writing but not sure what he was writing about.

At p. 27 of the appeal record PW4 was cross-examined as follows:

- b* Q: What was the defendant writing with?
A: He was writing with ball point. The exh. P5 that was seized by the police.
Q: Look at P6 (line 7-12), the ballpoint was seized from the accused's shirt pocket?
A: Yes.
- c* Q: During the search only one pen was found by you?
A: Yes.

I shall now deal with grounds 3.1 and 3.2 of the petition of appeal.

- d* In the case of *Chean Siong Guat v. Public Prosecutor* [1969] 2 MLJ 63 His Lordship Abdul Hamid J (as he then was) at pp. 63 and 64 said:

- e* Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies. Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor or serious discrepancies. If, after considering the discrepancies, a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth.

- g*
- h* The fact that PW1 did not testify that he had seen the respondent writing can be due to the fact that he did not see the respondent writing. It could be due to the fact that PW1 might have seen the actions of the respondent in different ways and at different times as that of PW2 and PW4. In my view, the evidence of PW1 does not create any discrepancy. There was no two sets of
- i* evidence adduced by the prosecution. Therefore it was wrong for the learned

magistrate to make a finding that there were two sets of evidence adduced by the prosecution. The case of *Public Prosecutor v. Lee Eng Kooi* [1993] 2 CLJ 534 is distinguishable from the facts of the present case and therefore not applicable.

a

There was nothing inherently incredible about the testimonies of PW2 and PW4 that they saw the respondent writing something. Further PW4 has testified at p. 27 of the appeal record that the respondent was writing with a ball point. And the ball point was exh. P5 that was seized.

b

The learned magistrate did not give any reasons when he said “I think the prosecution witness especially PW2 and PW4 are trying to create a story that the accused was writing something relating to an illegal 4D.”

c

From the totality of the prosecution evidence, I find that the learned magistrate had grossly erred in law and in fact in not accepting the evidence of PW2 and PW4. Further from the evidence of PW1, PW2 and PW4, the incriminating exhs. P1 and P2 were found in the left hand of the respondent. There was no material discrepancies in the testimonies of PW1, PW2 and PW4 to the effect that P1 and P2 were recovered from the left hand of the respondent. In other words, P1 and P2 were found in the possession of the respondent.

d

I shall now deal with grounds 3.3 and 3.4.

e

The learned magistrate in his grounds of decision at p. 48 of the appeal record said:

Another contradictory evidence which I want to point out is as regard to the search list. PW1 said the search list was prepared by PW4. Whereas PW4 said in cross-examination that the content of search list was written by PW1 and PW4 acknowledged and signed on it. In my view, it would mean that PW4 was never at the said club. Since the search was made by PW1 only, that's why PW1 wrote on it to give the detail particulars of the exhibits. And of course, PW1 cannot sign on the search list since it will contravene section 64 of the Criminal Procedure Code. In other words, I think PW4 was not in the picture at all as regard to the arrest and seizure.

f**g**

PW1 at p. 10 of the appeal record had testified that “When we arrived there C/Insp. Rashid instructed us to arrest one person who was sitting near the table.”

h

PW2 at p. 15 of the appeal record had testified that on 22 May 1993 at 10.10am he joined a police party led by Chief Inspector Rashid made a search at the Club Memandu Pertama.

i

- a* It is clear that the learned magistrate erred in law and in fact in not taking into consideration the evidence of PW1 and PW2 that PW4 was with them during the raid. The learned magistrate did not give any reasons at all why he rejected the evidence of PW1 and PW2 on this point.
- b* I am of the view that ss. 64 and 65 of the CPC do not apply to this case because those sections referred to a search list made under Chapter VI of the CPC whereas in this case, the search list (P6) was made in consequence of a raid. (See *Public Prosecutor v. Lim Mung Shaing* [1989] 2 CLJ 475 at p. 478 para. D to E).
- c* Further, the discrepancy between the evidence of PW1 that the search list (P6) was prepared by PW1 and the evidence of PW4 that the contents of the search list (P6) was written by PW1 but signed by PW4 was not a material discrepancy.
- d* The testimonies of PW1 and PW2 that exhs. P1, P2 and P3 were found in the left hand of the respondent and that exhs. P4 and P5 were found in the shirt pocket of the respondent corroborates the contents of P6. So there was evidence for the learned magistrate to make a finding whether exhs. P1, P2, P3, P4 and P5 were found in the possession of the respondent. However, the learned magistrate erred in not making such a finding.
- e* In cross-examination PW4 at p. 28 of the appeal record was asked:
- Q: At that time, you were the investigating officer, do you have the investigation diary?
- f* A.: I do not have.
- In re-examination PW4 said “The investigation diary as far as I know is the diary containing particulars of investigation. The investigation officer of the particular case will keep the diary. It is not necessary for the raiding officer to write the diary.” (At pp. 28 and 29 of the appeal record).
- g* PW4 has clarified that the investigation diary is only used by the investigating officer and that it is not necessary for the raiding officer to write the diary.
- In view of this, I reject the contention of the respondent that if PW4 were to produce the investigation diary he will be shown to have been absent during the search.
- h*
- The learned magistrate did not give any reasons why he disbelieved the evidence of PW4 that PW4 did lead a police party to Sekolah Memandu Pertama where he saw the respondent writing something and that he instructed PW1 to search the respondent.
- i*

In *Khoon Chye Hin v. Public Prosecutor* [1961] 27 MLJ 105 His Lordship Thomson CJ at p. 107 stated:

... If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

Although in cross-examination PW5 the investigating officer agreed that on 22 May 1993 the respondent complained to him that Chief Inspector Rashid was not at the scene, there was other cogent evidence from PW1, PW2 and PW4 that PW4 was at the scene. Thus, there was ample evidence for the learned magistrate to make a finding that PW4 was at the scene.

On the totality of the evidence it was wrong for the learned magistrate to make a finding that PW4 was not in the picture at all as regard to the arrest and seizure.

Ground 3.5 of the petition of appeal has not complied with s. 307(vi) of the CPC and is therefore bad in law. (See *Public Prosecutor v. Hu Ming Chin* [1993] 3 AMR Supp. Rep. 1146).

In conclusion, I find that the learned magistrate had erred in law and in fact in not making the correct findings of fact. There was ample evidence that P1 to P5 were found in the possession of the respondent. The learned magistrate erred in law and in fact in not accepting the evidence of PW2 and PW4. The learned magistrate also did not give any cogent reasons why he disbelieved the evidence of PW4.

At the end of the close of the case for the prosecution, the prosecution has made out its case beyond reasonable doubt and the learned magistrate should have called the respondent to enter his defence.

Since the learned magistrate who heard this case has been transferred, I allow the appeal and order a retrial before another magistrate.

a

b

c

d

e

f

g

h

i